85-730

Supreme Court, U.S.
FILED
OCT 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HARRY FARKAS, Petitioner,

v.

NEW YORK STATE DEPARTMENT OF HEALTH
(headed by David Axelrod, M.D., Commissioner)
and
NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
(headed by Joseph A. F. Valenti, President
of the Civil Service Commission)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
and
REQUEST FOR SUMMARY REVERSAL

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OCTOBER, 1985

QUESTIONS PRESENTED

1. Whether the jury's verdict is contrary to the weight of the evidence.

a. Whether respondents stated a legitimate, nondiscriminatory reason for rejecting me for a promotion during the period from about January 16, 1980, to about May 22, 1980, as required by the Title VII discriminatory treatment test, the application of which was extended in the Second Circuit to actions brought pursuant to the Age Discrimination in Employment Act (ADEA). The position for which I was rejected was in the New York State Department of Health (DOH) and, during the above-stated period and 13 or more years preceding, was classified in the competitive class under the civil service title of Principal Radiological Health Engineer at salary grade M-4 from 1979 on and, prior to 1979, at the equivalent salary grade G-31. The

position was also known as Director, Bureau of Radiological Health, its "in-house" or "functional" title.

b. Whether respondents' reorganization of the Bureau of Radiological Health in January-February, 1980, lent legitimacy to their stated reason for rejecting me for promotion.

2. Whether the District Court erred in its charge to the jury

a. By omitting the applicability to this case of the Title VII discriminatory treatment test, referred to in question 1.a. above.

b. By omitting instruction that age discrimination did not have to be the only determinative factor in an employer's decision for rejecting an employee in order to find violation of the ADEA. Hagelthorn v. Kennecott Corp., 710 F.2d 76, 86 (2d Cir. 1983).

3. Whether the District Court erred

in removing the New York State Department of Civil Service (DCS) as a defendant.

4. Whether the District Court erred in limiting possible back pay, in its verdict sheet given to the jury, to $5,445 based on an assumed 4½% promotional salary increase instead of $9,075 based on an assumed 7½% promotional salary increase.

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To the Honorable Chief Justice and
Associate Justices of the
Supreme Court of the United States:

I, Harry Farkas, the petitioner herein, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this matter on May 15, 1985, and that a summary reversal of said judgment and opinion be granted.

I am representing myself in this petition but am not a lawyer.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals, entered May 15, 1985, which I seek to have reviewed and summarily reversed, is copied in the Appendix on pages 39-42 of this Petition. That court's denial of my petition for a rehearing, entered July 16, 1985, appears in the Appendix on page 43. The prior judgment against me of the United States District Court for the Northern District of New York, affirming a jury verdict, entered January 23, 1984, appears in the Appendix on pages 43-46. Before giving the case to the jury, the District Judge, orally from the bench, dismissed the action with respect to the DCS, one of the two respondents (defendants). To the best of my knowledge, the aforementioned judgments of the Appeals and

District Courts have not been reported.

Not appealed is the memorandum-decision and order favorable to me which was issued by the District Court September 2, 1982, prior to the trial by jury. The court declared the applicability to this case (no. 82-CV-511 in District Court) of the Title VII discriminatory treatment test and that I had made a prima facie showing under that test; and granted me preliminary relief. That memorandum-decision and order was docket entry no. 12 in Appeals Court (case no. 84-721C) and is reported in 554 F.Supp. 24 (1982). Pages 8 and 9 of the original 12 pages (beginning at [7] on page 28 and continuing to the end of the report on page 29 in 554 F.Supp. 24 (1982)) are copied in the Appendix on pages 46-51.

JURISDICTION

The judgment of the Court of Appeals

was entered May 15, 1985, and that court's denial of my petition for a rehearing was entered July 16, 1985. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1) within the time prescribed by 28 USC § 2101(c).

STATUTES AND CASE LAW INVOLVED

This case involves the following cited statutes and case law. Pertinent texts are set forth in the Appendix at the pages of this Petition indicated.

Age Discrimination in Employment Act of 1967, as Amended (29 USC § 621, et seq.) "ADEA" — texts of pertinent sections at pages 52-53.

Case law — Extension of Title VII discriminatory treatment test to actions brought pursuant to the ADEA — text at pages 48-49, included as part of text of District Court's September 2, 1982, memorandum-decision and order

New York State Civil Service Law, § 52.7,

§ 65.1, and § 131.2(a) — texts at pages 54-57.

STATEMENT OF CASE

This is an age discrimination in employment action brought by my complaint filed in the United States District Court for the Northern District of New York May 27, 1982, pursuant to the ADEA (29 USC § 621, et seq.). The grounds for Federal jurisdiction in the District Court were sec. 7(c)(1) of the Act (29 USC § 626(c)(1)).

I complained of my rejection for promotion to either of two positions in the DOH, but, in this petition, as I did in my appeal, I am focusing on only one in order to more clearly demonstrate the violation. That one is the position of Principal Radiolcgical Health Engineer, its civil service title, also known as Director, Bureau of Radiological Health, its "in-house" or "functional" title.

See question 1.a. on pages i-ii above for more details concerning the position.

The position became vacant about January 16, 1980, with the retirement of the incumbent, my immediate superior. I held the position, in permanent competitive status, of Associate Radiological Health Engineer and had done so for more than 15 years. My position was, and had always been, classified at salary grade G-27. Its salary grade was never converted to the equivalent salary grade M-2.

I had passed three civil service examinations for the vacated position, two in 1967 and one in 1963. Because the eligible lists had expired, § 52.7 of the State Civil Service Law became applicable and, by virtue of my having passed at least one earlier examination for the position, I was eligible for immediate permanent promotion to the position when

it was vacated without further examination. See § 52.7 of the Civil Service Law on pages 54-55 of the Appendix.

However, instead of appointing me to the position, my employer, respondent DOH, selected another employee, a man 27 years younger than I, who lacked the minimum required civil service qualifications for the position. A memorandum was issued January 18, 1980, appointing the unqualified selectee Acting Director, Bureau of Radiological Health, effective as of the date of the memorandum, just two days after the position was vacated.

I was approaching my 67th birthday, March 12, 1980, at the time. I am now retired, having been required to retire as of April 1, 1983, under the former State law requiring State employees to retire at age 70. Under new State law, mandatory retirement for age was abolished for the position in question

effective January 1, 1985.

In accordance with a January, 1980, executive memorandum issued by the State Commissioner of Health, announcing a reorganization of the Bureau of Radiological Health effective February 1, 1980, the process of reorganizing the bureau was being carried out during January-February, 1980, in accordance with plans formulated in advance of that period. The DOH failed to obtain the approval of the Governor's Division of the Budget required to make the reorganization official and abandoned it about January, 1982.

About March 19, 1980, the DOH, as required by § 65.1 of the State Civil Service Law (reproduced on pages 55-56), presented to the DCS for approval the provisional appointment of the selectee who had been chosen in preference to me. In accordance with official civil service

procedure for such transactions, the DCH was compelled to designate the position by its civil service title, Principal Radiological Health Engineer, rather than by its "in-house" or "functional" title, Director, Bureau of Radiological Health. The DCS disapproved the provisional appointment of the selectee, stating as its reason his lack of the minimum qualifications required for the position of Principal Radiological Health Engineer. The DCS informed the DOH further that the disapproval could not be modified because I, a qualified candidate, was available.

Thereupon, the DCH admittedly had the disapproved unqualified selectee draft a proposed reclassification of the position, changing the civil service title to Director, Bureau of Environmental Radiation, at the same salary grade, M-4, and changing the required qualifications to qualifications which the selectee could

then meet. The DOH presented the proposal to the DCS and the latter department promptly approved the reclassification. It became effective about May 22, 1980. The reclassification did not disqualify me, but it enabled the DOH to continue the selectee in the position and thus exclude me from it.

My protests to the DOH's affirmative action officer (who doubled as director of personnel) and the DCS's Civil Service Commission fell on deaf ears. So did my protests to Governor Carey. Under State law, the State Division of Human Rights had no jurisdiction with respect to employees, such as I, over the age of 65.

I then (August 14, 1980) filed age discrimination charges against respondents DOH and DCS under the ADEA with the Federal Equal Employment Opportunity Commission (EEOC). The EEOC wrote respondents that it found my non-selec-

tion to the position of Principal Radiological Health Engineer to be in violation of the ADEA; and that changing the position description [reclassification] to fit the previously unqualified candidate's [selectee's] qualifications was viewed as a subterfuge to discriminate against me. However, respondents refused the EECC's conciliation request that, as remedy for the violative act, I be promoted to the salary grade of Principal Radiological Health Engineer with appropriate back pay. (See the three letters from the EEOC, dated December 19, 1980, February 27, 1981, and February 27, 1981; which were attached to my complaint filed in District Court, docket entry no. 1 in Appeals Court.)

I then (May 27, 1982) filed my complaint under the ADEA in District Court.

Eight days later (June 4, 1982), I

took a qualifying oral test conducted by the DCS for Director, Bureau of Environmental Radiation, the civil service title to which Principal Radiological Health Engineer had been reclassified. As explained on pages 6-7 above, I had already achieved eligibility for promotion permanently without further examination, under § 52.7 of the State Civil Service Law. But I took the oral test in order to protect my interests in the face of the age discrimination that was being practiced against me.

The oral test examiners demonstrated that they judged me to have passed the test better than marginally by not asking me the fourth or back-up question, in addition to the regular three questions of the test, which was reserved (as shown on the DCS's official audio-tape of its briefing of the examiners before the tests) for marginal or failing candidates.

Yet, the DCS mailed me a notice of a failing rating of my oral test. In answer to my protest, the DCS sent me what it called an "oral test summary," an explanation of how I was graded. When I found in it misrepresentations of my test answers and other errors, I requested, and was permitted, to listen to the audio-tape of my test. Examining the "test summary" and tape, I verified that the examiners did not ask me the extra question reserved for marginal or failing candidates, falsified my answer to one of the three questions, and reversed the satisfactory rating of my experience evidenced by my having been called to the oral test and the taped briefing of the examiners that only candidates whose training and experience had been rated as satisfactory by the DCS were being called. Experience was not a subject of the oral test and the examiners had no authority

to even rate it, let alone reverse a satisfactory rating of it. Through discovery in this case, I have obtained from the DCS copies of its official audio-tapes of the briefing of the oral test examiners, my oral test, and the oral tests of several other candidates, including that of the selectee, who, when he was unqualified, had been placed and kept in the position during the period from January 18 to May 22, 1980, while I was rejected for the position. The tape of his test showed that he was asked the extra question reserved for marginal or failing candidates. In answer to my request to the DCS's Civil Service Commission for permission to appeal my test rating, the Commission was silent regarding my true passing rating indicated by the examiners' not asking me the extra question reserved for marginal or failing candidates, acknowledged errors in my

test rating but dismissed them as "minor inaccuracies," and denied my request for permission to appeal.

A motive for the DCS's fabrication of a false rating of my oral test and arbitrary refusal to correct it is readily apparent in respondents' answer of July 30, 1982 (docket entry no. 10 in Appeals Court) to my complaint. They wrote:

"THIRD DEFENSE:

SIXTH: This proceeding is academic since plaintiff has failed the civil service examination for the position which he seeks."

That defense served to give the false impression that the test rating revised the historical fact that I had already achieved eligibility for permanent promotion to the position for which I had been rejected, under § 52.7 of the Civil Service Law. At trial before the jury, respondents' attorney elicited testimony

of my failing rating in further pursuance of the above defense.

When I attempted to rebut with evidence that the failing rating was false, as described above on pages 12-15, the District Judge cut me off, holding the rating to be irrelevant to discrimination, and would not permit me to fully develop the evidence. He then, from the bench, removed the DCS as a defendant.

I petitioned the State Supreme Court on July 19, 1983, for judicial review of my test rating. The DCS has never offered any defense of the false rating, but has successfully blocked, until now, a determination by the court of the merits of my petition by motions to dismiss based on procedural doctrines. I finally won a reversal of the latest dismissal as of October 10, 1985, and look forward to the State court's ordering the correction of my test rating to

passing.

At pre-trial conferences conducted by the District Judge, I calculated the minimum percentage salary increase which I would have received if, on January 18, 1980, I had been promoted from my position as Associate Radiological Health Engineer, classified at salary grade G-27 and never at the equivalent grade M-2, to the position of Principal Radiclogical Health Engineer, classified at salary grade M-4 but formerly at the equivalent grade G-31. The salary grade interval advanced would have been four G grades (G-27 to G-31) or two M grades (M-2 to M-4). The formula provided by § 131.2(a) of the State Civil Service Law for minimum percentage salary increase on promotion is 1½% + 1½% x number of salary grades advanced. However, from April 1, 1979, through March 31, 1982, § 131.2(a) was ambiguous for promotions from

G-graded to M-graded positions and from M-graded to G-graded positions, because it neglected to take into account the fact that each M grade spanned two G grades. The ambiguity was corrected effective April 1, 1982, by the addition of a sentence requiring that each M grade be counted as two grades (the equivalent of two G grades) in the number of salary grades advanced in the formula. Using four G grades advanced, I calculated the promotional salary increase as 7½% and the back pay from January 18, 1980, to April 1, 1983, when I retired, as $9,075. Respondents paid me the 7½% increase from September 2, 1982, on in complying with the District Court's order of that date (see Appendix at page 50 of this Petition) granting me the preliminary relief of an increase to the salary of the position of Principal Radiological Health Engineer. (I had to refund the

additional moneys paid to me when I lost the jury verdict January 23, 1984.)

On the morning of January 3, 1984, the day trial was scheduled to start (it started on the 12th), respondents' attorneys, for the first time, disputed my calculations of the percentage salary increase and amount of back pay. They then claimed that the two M grades advanced should have been used, instead of the four G grades, yielding a 4½% salary increase and back pay of $5,445. The State, rather than I, would be reasonably expected to have records showing how salary increases were calculated and paid to State employees for promotions such as the one in question, for which § 131.2(a) of the Civil Service Law was ambiguous as explained on pages 17-18 above. Yet, respondents produced no such records. Without requiring them to do so, the District Judge accepted their back

pay figure of $5,445 and placed it in question no. 2 of the verdict sheet (see Appendix, page 44) which he gave to the jury, as the amount of back pay that could be awarded to me. By waiting until the last minute to dispute my calculations of back pay, respondents denied me the opportunity to use discovery to obtain the records showing how promotional salary increases had been calculated and paid.

After trial, during October-December, 1984, under the State Freedom of Information Law, I wrote to the office of the State Attorney General, attorney for respondents, requesting the documents upon which respondents had based their claim that a 4½% promotional salary increase (resulting in a back pay amount of $5,445) calculated by the number of M grades advanced was appropriate. That office replied that they had used docu-

ments borrowed from and returned to the Office of the State Comptroller, but had not made notes identifying the documents. I then forwarded that information to the Office of the State Comptroller and requested that they send me the documents. That office replied that they had no records of documents loaned to the Attorney General's staff for use as a basis for making the salary calculations in question.

REASONS FOR GRANTING WRIT

1. The jury verdict is contrary to the weight of the evidence.

a. At trial in District Court, respondents (defendants) stated as their reason for rejecting me the opinion of officials of the DCH that I was less qualified for the position than the person selected, in view of the reorganization of the bureau. For the period from January 18 to May 22, 1980, during

which I was rejected (although my rejection continued thereafter), the DCS, acting under authority of § 65.1 of the Civil Service Law (see Appendix, pages 55 -56), determined that I was qualified for the position and that the person selected and placed in it by the DCH was not qualified for it. See pages 6-9 above. No officials of the DCH had any legal authority, as shown by § 65.1, to supersede or set aside the determination made by the DCS. The argument made by respondents in Appeals Court that the DCH had a right to select for appointment the candidate it judged to be the most qualified among available candidates, did not confer authority to select an unavailable candidate. The determination made by the DCS under § 65.1 that the DCH's selectee was not qualified rendered him unavailable. By stating a reason for rejecting me for the period from January 18 to May

22, 1980, which is contradictory to § 65.1 of the Civil Service Law and, therefore, without legitimacy, respondents failed to meet their burden under the Title VII discriminatory treatment test of providing evidence of a legitimate nondiscriminatory reason for rejecting me. See Appendix, pages 48-49.

b. The reorganization of a bureau does not change the required qualifications for the positions in that bureau. The qualifications required for any position are changed only by a reclassification of that position. Even then, the reclassification must specify such change or changes. In the case of the position of Principal Radiological Health Engineer, that was not done until about May 22, 1980 — after the four-month period during which I, a qualified candidate, had been rejected in favor of a younger unqualified candidate. That four-month

period, from January 18 to May 22, 1980, was after the reorganization plan had been formulated and continued into the two or three months after the reorganization had been implemented. By keeping the civil service title of the position as Principal Radiological Health Engineer throughout those four months and, during that time, placing and trying to provisionally appoint the other candidate in the Principal Radiological Health Engineer-titled position, respondents demonstrated that that title was the appropriate title for the position in the reorganized bureau, not only for the present but for the future as well. Their actions showed that they used the reorganization as a smoke screen (regardless of whether or not the reorganization was bona fide) to justify reclassifying the position following the disapproval of their selectee for his failure to meet

the minimum civil service qualifications required for the unreclassified position. Their actions proved that the EEOC was correct (see pages 10-11 above) in finding my non-selection to be in violation of the ADEA and that the reclassification changing the position qualifications so that the previously unqualified selectee could meet them was a subterfuge to discriminate against me. Neither the reorganization nor the reclassification altered any of the facts set forth in reason 1.a. on pages 21-23 above proving that there was no legitimacy in respondents' stated reason for rejecting me.

2. In charging the jury, the District Judge omitted any reference to the applicability to this case of the Title VII discriminatory treatment test (see Appendix, pages 48-49). He informed both parties that he was doing so on the basis of Hagelthorn v. Kennecott Corp., 710 F.

2d 76, 85 (2d Cir. 1983). But the decision in that case does not provide authority for the complete omission of the Title VII discriminatory treatment test even in layman's language as the Judge did. The Second Circuit approved only the omission of "such lawyerly cant as '*prima facie* case' and 'shifting burden of proof,' [which] would only have confused the jury." The District Judge also deviated from *Hagelthorn* by using in his charge the term "competent evidence" (page 745, lines 7-8, of the transcript of the trial), which is cant just as lawyerly as the terms which the Second Circuit found would be confusing to a jury. Not only did the Judge omit the Title VII test, but he charged the jury to apply the law as he gave it, minus the case law applying the Title VII test to this case. See page 743, line 25, page 744, line 1, and page 749, lines 19-20, of the trial

transcript. (NOTE: As a result of motions filed by respondents in District and Appeals Courts, I was compelled to purchase, at a cost of $1,548, the 774-page transcript of the trial and file it with my appeal, instead of using the agreed statement which I had drafted and proposed.) Thus, the District Court, in effect, prohibited the jury from applying the Title VII discriminatory treatment test. The jury's verdict, proved in reason 1.a.&b. on pages 21-25 above to be contrary to the weight of the evidence, demonstrates that the jury followed the Judge's charge and did not apply the Title VII test. I was denied the benefits of that test through the Judge's error in omitting it from his charge.

The Judge's error in omitting from his jury charge instruction that age discrimination did not have to be the only

determinative factor in an employer's decision for rejecting an employee in order to find a violation of the ADEA, Hagelthorn v. Kennecott Corp., 710 F.2d 76, 86 (2d Cir. 1983), denied me the opportunity for a favorable verdict if the jury happened to find determinative factors in my employer's decision in addition to age discrimination.

3. The DCS was compelled, by the lack of qualifications of the DOH's selectee and my availability as a qualified candidate, to disapprove his provisional appointment to the position of Principal Radiological Health Engineer about March 19, 1980. The position, at that time, was in the already formulated and implemented reorganization. When, soon afterward, the DOH's proposal to reclassify the position came to the DCS using as justification the reorganization for which the unreclassified position had

shortly before been shown by the DOH to be its choice as appropriate, it was obvious that the reorganization, legitimate or not, was being used by the DOH as a smoke screen to justify the proposed reclassification of the position. It was then obvious, too, that the reclassification was a subterfuge to give special favor to the previously unqualified candidate and thus discriminate against me. This not only violated the ADEA as the EECC found (see pages 10-11 and 25 above). It also violated the civil service merit system principle of no favor to or discrimination against any applicants for positions, which the DCS has a duty to protect. By approving the reclassification, which could not have been put into effect without such approval, the DCS made itself a partner with the DOH in the discrimination against me in violation of the ADEA.

As shown on pages 12-17 above, the DCS manipulated my true passing rating in the June 4, 1982, civil service oral test to fabricate a false failing rating to be used by respondents as a defense creating a false impression prejudicial to my cause, and respondents did so use it. This falsification of my test rating by the DCS was an act of retaliation for my bringing suit and violated sec. 4.(d) of the ADEA (29 USC § 623(d)) which prohibits such retaliation.

The foregoing (on pages 28-30) demonstrates that I properly complained against both the DOH and the DCS. The District Court erred in removing the DCS as a defendant.

4. The following facts weigh in favor of my back pay figure of $9,075 based on a 7½% salary increase. See pages 17-21.

a. My position was classified at salary grade G-27 and never at the equiv-

alent grade M-2. The position to which I should have been promoted was classified at salary grade M-4 but for 15 or 16 years, until the year before, had been classified at the equivalent grade G-31. It was, therefore, more logical, in view of the ambiguity of § 131.2(a) of the Civil Service Law at that time, to use the four G grades from G-27 to G-31, rather than the two M grades from M-2 to M-4, in the formula, 1½% + 1½% x number of salary grades advanced, and thus arrive at my figures.

b. The April 1, 1982, amendment to § 131.2(a) requiring that each M grade be counted as the equivalent of two G grades shows legislative intent that the calculation be made by the number of G grades advanced, as I have done.

c. Respondents, without disputing it, paid me the 7½% salary increase, corresponding with my calculation, in

complying with the District Court's September 2, 1982, award to me of the promotional salary increase as preliminary relief.

d. Even though the State, rather than I, would be reasonably expected to have records showing how salary increases were calculated and paid for promotions such as the one in question, respondents have failed to produce any such records or any other documents to support their calculation of the lower back pay figure accepted by the District Court.

e. Respondents have been unwilling or unable to furnish to me the records or documents specified in "d" above in response to my requests for them under the State Freedom of Information Law. The response from the office of the State Attorney General, attorney for respondents, that his staff attorneys had used documents borrowed from and returned to

the Office of the Comptroller as the basis for respondents' calculation of the lower back pay figure was contradicted by the Comptroller's Office when I inquired there.

f. Respondents' waiting until the last minute before trial to claim the lower back pay figure prevented me from using discovery to obtain the records or documents upon which they based their claim.

g. Respondents' behavior, as described in "d," "e," and "f" above, leads to the reasonable inference that they have no basis for their claim of the lower figure but are using it as retaliation for my bringing suit, in violation of sec. 4.(d) of the ADEA (29 USC § 623(d)).

The District Court erred in setting the amount of back pay at $5,445, instead of $9,075.

5. The Court of Appeals used the following false premises on which to base its dismissal of my appeal:

a. That the reorganization was a legitimate, business-related reason for rejecting me. In reason 1.a.&b. on pages 21-25 above, I have proved that respondents provided no evidence of a legitimate reason for rejecting me and that the reorganization lent no legitimacy to the reason they stated.

b. That promoting me would have prevented my employer from reorganizing the bureau, such prevention not intended by the ADEA. This false premise is implied by the Court's statement that "the ADEA is not intended to prevent an employer from instituting structural changes in furtherance of legitimate business goals, even when those changes would involve alterations in the employment prospects and expectations of other-

wise highly qualified individuals such as Farkas." Even conceding for the purpose of argument that the reorganization may have been legitimate, my proof, in reasons 1.a.&b. on pages 21-25 and 5.a. on page 34, above, that it gave no legitimacy to respondents' stated reason for rejecting me invalidates the implied premise. Furthermore, the notion underlying the premise, that my promotion, as a qualified candidate, to the position in compliance with the ADEA would have prevented the reorganization, while an unqualified candidate was actually placed in the position without preventing the reorganization, makes no sense. The license given to my employer by the premise, to discriminate against me in violation of the ADEA during a reorganization, is contradictory to the ruling in Hagelthorn v. Kennecott Corp., 710 F.2d 76, 81 (2d Cir. 1983) at [2].

c. That the District Court did not err in forgoing the inclusion of the Title VII discriminatory treatment test in its jury charge. The falsity of this premise is proved in reason 2. on pages 25-28 above.

d. That the DCS does not function to prevent the State from altering the organization of its bureaucracy [reorganizing]. Under State procedures, the DCS does not function to either approve or disapprove reorganizations by State agencies. It does function to approve or disapprove reclassifications of positions and to do it in conformance with the principle of the State's civil service merit system, not to favor or discriminate against any candidate. In approving the reclassification which gave special favor to the previously unqualified candidate, discriminating against me, a qualified candidate, the DCS became,

along with the DOH, a violator of the ADEA and should not have been removed as a defendant by the District Court. See reason 3. on pages 28-30 above.

6. The Court of Appeals' denial, without opinion, of my petition for a rehearing, leaving unanswered my objections detailing that Court's errors, compels me to turn to the Supreme Court for justice.

SUMMARY REVERSAL IS APPROPRIATE

The violation is flagrant and shows arrogant disregard by respondents for the ADEA and the trust placed in them as State officials.

My age of 72½ years gives more meaning to the truism that justice delayed is justice denied.

If the Court wishes, this Petition may be treated as my brief on its merits.

A summary reversal would be most appropriate.

CONCLUSION

WHEREFORE, I, Harry Farkas, petitioner, respectfully pray that a writ of certiorari and a summary reversal be granted.

Harry Farkas

HARRY FARKAS
Petitioner, pro se
50 Rapple Drive
Albany, New York 12205
Tel. 518/869-0676

October, 1985

APPENDIX FOLLOWS ON PAGES 39-57

A P P E N D I X

OPINIONS BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Harry Farkas,

Plaintiff-Appellant,

v.

New York State Department of Health (headed by David Axelrod, M.D., Commissioner) and New York State Department of Civil Service (headed by Joseph A. F. Valenti, President of the Civil Service Commission),

Defendants-Appellees.

84-7210

O R D E R

Filed May 15, 1985

Harry Farkas appeals from a judgment of the United States District Court for the Northern District of New York, Roger J. Miner, Judge, entered in favor of

appellee New York State Department of Health ("DOH") after a jury verdict of no cause of action, and from an order of the district court dismissing Farkas's complaint against appellee New York State Department of Civil Service ("DCS"). Farkas brings his appeal pro se, advancing a number of claims, the foremost being that the jury's verdict is contrary to the weight of the evidence. Because we find this claim and Farkas's remaining claims to be without merit, we are required to affirm the judgment and order below.

At trial, DOH presented evidence to prove that a legitimate, business-related reason animated its decision not to promote Farkas to the position he seeks. On review of the record, we find such a reason in DOH's decision to reorganize its personnel structure and requirements with an eye to addressing changing

conditions. The Age Discrimination in Employment Act is not intended to prevent an employer from instituting structural changes in furtherance of legitimate business goals, even when those changes would involve alterations in the employment prospects and expectations of otherwise highly qualified individuals such as Farkas. Being reluctant to disturb unless clearly erroneous the jury's resolution of the factual conflict between Farkas's claim of age discrimination and DOH's rebuttal from legitimate business reason, we do not do so here.

Nor did the district court err when, following Hagelthorn v. Kennecott, 710 F.2d 76, 85-86 (2d Cir. 1983), it elected to forego in its jury charge a formalized recitation of the burden shifts involved in Title VII and doctrinally related employment discrimination litigation. We find nothing to suggest that the jury

misapprehended the appropriate legal constraints governing its determination of the facts.

For related reasons, we affirm the district court's order dismissing Farkas's claim against DCS. Although DCS maintains and enforces rules governing State personnel, it does not function to prevent the State from altering the organization of its bureaucracy when alterations are felt necessary; Farkas's claim of age discrimination was properly leveled at DOH, not DCS.

Appellant's remaining claims, because governed or made moot by our reasoning on the foregoing claims, must be rejected.

Judgment and order affirmed.

/signed/ J. EDWARD LUMBARD,
JAMES L. OAKES,
RICHARD J. CARDAMONE
Circuit Judges.

[DENIAL OF MY PETITION FOR A REHEARING]

Filed July 16, 1985

Present: No. 84-7210

HON. J. EDWARD LUMBARD,

HON. JAMES L. OAKES,

HON. RICHARD J. CARDAMONE,

Circuit Judges

A petition for a rehearing having been filed herein by Plaintiff-Appellant Harry Farkas, pro-se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/signed/ Elaine B. Goldsmith

Clerk

The case in the United States District Court for the Northern District of New York, Roger J. Miner, Judge, was no. 82-CV-511.

The jury verdict was the one-word answer, "No," to Question No. 1 of the

verdict sheet (reproduced below) submitted by Judge Miner to the jury.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

HARRY FARKAS, Plaintiff,

-against-

NEW YORK STATE DEPARTMENT OF HEALTH (Headed by David Axelrod, M.D., Commissioner), Defendant.

No. 82-CV-511

Question No. 1

Do you find that the defendant New York State Department of Health discriminated against plaintiff by failing to promote him because of age?

Yes_____ No_____

(If your answer is no, go no further)

Question No. 2

Do you award plaintiff back pay in an amount of $5,445.00 and pension and all other emoluments of the position of Principal Radiological Health Engineer?

Yes_____ No_____

Question No. 3

Do you find that the defendant's discrimination was willful and that plaintiff is entitled to liquidated damages?

Yes_____ No_____

Dated: January , 1984 _____
FOREPERSON

Following is the District Court's judgment against me affirming the jury verdict.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

HARRY FARKAS

v.

NEW YORK STATE DEPARTMENT OF HEALTH

DOCKET NUMBER 82-CV-511

NAME OF JUDGE HON. ROGER J. MINER

Jury Verdict. This action came before the Court and a jury with the judicial

officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that Judgment be entered in favor of Defendant NEW YORK STATE DEPARTMENT OF HEALTH based upon a Verdict of No Cause of Action.

I CERTIFY THAT
THIS IS A TRUE COPY
J. R. SCULLY
CLERK, U.S. DISTRICT COURT

/signed/ BY Virginia Lee Lumpkin
DEPUTY
DATE 1/23/84

Not appealed is the District Court's September 2, 1982 (prior to trial) memorandum-decision and order granting me preliminary relief. Pages 8 and 9 of the original 12 pages of that document (in 554 F.Supp. 24 (1982), beginning at [7]

on page 28 and continuing to the end of the report on page 29) are reproduced following.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

HARRY FARKAS, Plaintiff,

-against-

NEW YORK STATE DEPARTMENT OF HEALTH (Headed by David Axelrod, M.D., Commissioner)

and

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE (Headed by Joseph A. F. Valenti, President of the Civil Service Commission), Defendants.

ROGER J. MINER, D.J. 82-CV-511

MEMORANDUM-DECISION and ORDER

* * *

[7] Here, plaintiff has demonstrated a likelihood of success on the merits by making a prima facie showing of discrimi-

natory treatment which defendants have failed to rebut. In this Circuit, application of the Title VII discriminatory treatment test, originally set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), has been extended to actions brought pursuant to the ADEA. Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), cert. denied, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed. 332 (1981). Under this test, a prima facie case of discriminatory treatment is made out by the plaintiff's showing:

> (1) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer

continued to seek applicants from persons of complainant's qualifications.

Geller v. Markham, supra, 635 F.2d at 1032, citing McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 802, 93 S.Ct. at 1824. "The burden then shifts to the employer to go forward with evidence of 'some legitimate, nondiscriminatory reason for the employee's rejection.'" Id. at 1032.

Here, plaintiff has made a prima facie showing by establishing that he is a member of the class of people within the protection of the ADEA, that he applied for and was qualified for the newly created directorships, that despite his qualification he was not promoted, and that the positions were subsequently filled by the appointment of applicants younger than he. Accordingly, it was incumbent upon defendants to come forward

with "some legitimate nondiscriminatory reason for [plaintiff's] rejection." Id. However, defendants have offered no reason, nondiscriminatory or otherwise, why plaintiff was not promoted to one of the new directorships and the two younger applicants were. This Court believes, therefore, that plaintiff has demonstrated a likelihood of success on the merits and has met this Circuit's test for the granting of a preliminary injunction.

IV

In determining that plaintiff is entitled to preliminary relief, this Court is mindful of the potentially disruptive effect injunctive relief might have upon the state in its capacity as employer. Accordingly, Mr. Farkas shall receive a salary commensurate with the position to which he seeks appointment during the pendency of this action.

However, Mr. Farkas shall continue to serve in his present capacity as Associate Radiological Health Engineer.

In addition, plaintiff will be required to post a sufficient bond, securing the state against any loss, which it may eventually be entitled to recover, due to additional wages paid during the pendency of this action. See Ohio Oil Company v. Conway, 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972 (1929).

The foregoing shall constitute this Court's Findings of Fact and Conclusions of Law as required by the provisions of Rule 52(a), Fed. R. Civ. P.

It is so Ordered.

Dated: September 2, 1982
Albany, New York

/signed/ ROGER J. MINER
U.S. DISTRICT JUDGE

STATUTES AND CASE LAW INVOLVED

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, AS AMENDED (29 USC § 621 et seq.)

Texts of Pertinent Sections

* * *

SEC. 4. (a) (29 USC § 623(a)) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

SEC. 4. (d) (29 USC § 623(d)) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... has made a charge, testified, assisted, or participated in

any manner in an investigation, proceeding, or litigation under this Act.

* * *

SEC. 7. (c)(1) (29 USC § 626(c)(1)) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act ...

* * *

SEC. 11. (29 USC § 630) For the purposes of this Act—

. . . . .

(b) The term "employer" .... also means ... a State ... and any agency or instrumentality of a State ....

* * *

SEC. 12. (a) (29 USC § 631(a)) The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age....

* * *

CASE LAW

Extension of Title VII discriminatory treatment test to actions brought pursuant to the ADEA. Text appears on pages 48-49 above as part of the District Court's memorandum-decision and order of September 2, 1982.

NEW YORK STATE CIVIL SERVICE LAW

§ 52.7 Promotion by non-competitive examination. Whenever there are no more than three persons eligible for examination for promotion to a vacant competitive class position, or whenever no more than three persons file application for examination for promotion to such position, the appointing officer may nominate one of such persons and such nominee, upon passing an examination appropriate to the duties and responsibilities of the position may be promoted, but no

examination shall be required for such promotion where such nominee has already qualified in an examination appropriate to the duties and responsibilities of the position.

§ 65.1 Provisional appointments authorized. Whenever there is no appropriate eligible list available for filling a vacancy in the competitive class, the appointing officer may nominate a person to the state civil service department or municipal commission for non-competitive examination, and if such nominee shall be certified by such department or municipal commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination. Such non-competitive examination may consist of a review and evaluation of the training, experience and other qualifica-

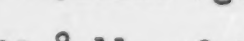
tions of the nominee, without written, oral or other performance tests.

§ 131.2(a) If such an employee is promoted, appointed or otherwise advanced to a position in a higher salary grade he shall receive a percentage increase in existing basic salary of one and one-half percent plus one and one-half percent times the number of grades by which he is so advanced, or he shall be paid the hiring rate of such higher grade, whichever results in a higher annual salary. [THE FOLLOWING SENTENCE WAS ADDED BY CHAPTER 460 OF 1982 EFFECTIVE APRIL 1, 1982.] For purposes of determining such increase for employees promoted, appointed or otherwise advanced to a position in one of the salary grades with the prefix M as prescribed in paragraph d of subdivision one of section one hundred thirty of this article, each grade with the prefix M shall be deemed to constitute a

two grade advancement.

JUDGMENT SOUGHT TO BE REVIEWED

I seek to have reviewed and summarily reversed the judgment and opinion of the Second Circuit Court of Appeals, the text of which, with denial of my petition for a rehearing, is reproduced on pages 39-43 above, affirming the judgment of the Northern New York District Court based upon the jury verdict, the texts of which are reproduced on pages 43-46 above, and the oral order of the District Court dismissing my complaint against the DCS (page 397, lines 8-11, of the transcript of the trial).



No. 85-730

Supreme Court, U.S.
FILED
NOV 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

HARRY FARKAS,

Petitioner,

against

NEW YORK STATE DEPARTMENT OF HEALTH (headed by David Axelrod, M.D., Commissioner) and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE (headed by Joseph A. F. Valenti, President of the Civil Service Commission),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

BRIEF IN OPPOSITION

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Of Counsel

Dated: November 6, 1985

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RULES OF THE UNITED STATES SUPREME COURT

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No. 85-730

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HARRY FARKAS,

Petitioner,

against

NEW YORK STATE DEPARTMENT OF HEALTH (headed by David Axelrod, M.D., Commissioner) and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE (headed by Joseph A. F. Valenti, President of the Civil Service Commission),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT and REQUEST FOR SUMMARY REVERSAL

BRIEF IN OPPOSITION

The Petition

Petitioner, the plaintiff in this action, seeks a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, entered on May 15, 1985, which affirmed unanimously a judgment and order of the United States District Court, Northern District of New York, dated January 23, 1984, dismissing his complaint after an adverse jury verdict. The order of the Court of Appeals has not been reported.

Issues Presented

1. Whether the petition raises novel and substantial questions of law warranting consideration by this Court.

2. Whether the order of the Court of Appeals is in conflict with prior decisions of this Court or other Courts of Appeals.

Statement of the Case

Petitioner was employed by the New York State Department of Health (hereafter "DOH") from 1958 until his retirement in 1983. In 1963, he was promoted to the position of Associate Sanitary Health Engineer (Radiology) in the Bureau of Radiological Health Services. From 1964 until 1980, he served as section head of the field assistance and x-ray section, one of two or three sections which comprised the bureau at various times. Also during that time he served as interim head of the bureau on occasions when the bureau director, Sherwood Davies, was away from the office.

During his tenure as bureau director, Mr. Davies held the competitive civil service title of Principal Radiological

Health Engineer (Salary Grade 31). Petitioner had also qualified by examination for that title, but since the only budgeted position carried with it the designation as bureau director, he could not receive appointment while Mr. Davies remained in service.

Mr. Davies retired from State service in January 1980. Dr. Karim Rimawi was named acting director of the bureau. Petitioner was then 67 years of age and Dr. Rimawi was 40 years old. *See* Petition, pp 13-14. Nevertheless, Dr. Rimawi held the same civil service grade level as petitioner (SG27), although in a different title (Associate Radiological Health Specialist), and was section head of the other major sections in the bureau.

Dr. Rimawi was a physicist by training, with a doctoral degree and work experience in the field of nuclear radiation. The title of Principal Radiological Health Engineer, on the other hand, required engineering training and licensure as a professional engineer. Consequently, because Dr. Rimawi did not possess the established credentials for the Radiological Health Engineer series, an effort by the Commissioner of Health to appoint him provisionally to the Grade 31 civil service title was disapproved by the Department of Civil Service. Nevertheless, he was duly designated as acting head of the bureau while still occupying his Grade 27 position. Thereafter, the position of Bureau Director was established in the competitive class, in its own right, by Civil Service, and Dr. Rimawi passed the examination for that title.[1] Thus, despite the fact that petitioner calls him "unqualified", Dr. Rimawi was duly appointed bureau director in full compliance with New York Civil Service Law.

---

[1]Petitioner also competed in the examination for that title, but failed the oral portion of the test.

Petitioner commenced this action against the Departments of Health and Civil Service, alleging that DOH had discriminated against him for promotion because of his age, and that Civil Service had participated in that action by failing him in the oral test for Bureau Director. On the trial of the action, petitioner was able to establish only that he was qualified for appointment and that a younger man had been appointed instead.

In rebuttal to petitioner's claim, DOH presented testimony to establish that at the time in question, the Department was in the process of a structural reorganization. DOH was seeking to shift its emphasis with regard to environmental radiation so as to address more fully the growing threats of nuclear waste disposal and mishaps in nuclear reactors, as exemplified by the Love Canal and Three Mile Island situations. For that reason, DOH chose to appoint a qualified nuclear physicist rather than a qualified sanitary engineer. Petitioner was unable to demonstrate, to the satisfaction of the jury, that the legitimate business reason advanced by DOH was merely a pretext for discrimination, and a verdict was returned against him.[2]

On appeal to the Court of Appeals, petitioner argued principally that the jury verdict was contrary to the weight of evidence and that the District Court had erred in its charge to the jury in regard to the respective burdens of proof in an age discrimination case. The Court found the verdict to be supported by the evidence (under the "not clearly erroneous" standard), stating that there was nothing in the verdict "to suggest that the jury misapprehended the appropriate legal constraints governing its

[2]At the close of plaintiff's case, the District Court dismissed the action as to the Department of Civil Service, for failure of proof. The Court of Appeals affirmed that order.

determination of the facts". Petr Appendix, p 41. Consequently, the judgment was affirmed.

ARGUMENT

The petition fails to address any of the recognized criteria for granting a writ of certiorari.

No "special and important" reasons, within the meaning of Rule 17 of the Rules of this Court, have been expressed in the present petition for granting a writ of certiorari. Petitioner does not claim that the order of the Court of Appeals is in conflict with prior decisions of this Court, or of another federal court of appeals on the same matter. He has not asserted that a significant constitutional question is at issue or that a matter of substantial public interest is involved. *Cf. Gordon v. New York Stock Exchange,* 422 US 659, 663 (1974). Indeed no such claims could validly be made in this case.

Instead, the main thrust of the petition here is that the jury verdict in the District Court was contrary to the weight of evidence. That same argument was made in the Court of Appeals and rejected by that Court. Specifically, the factual question presented was whether the "legitimate non-discriminatory reasons" advanced by the defendants for not appointing plaintiff were successfully rebutted by him as a mere pretext for discrimination.[3] This is a question, obviously, of the facts and is not of significance to other litigants or the nation as a whole. *Cf. United States v. Johnson,* 268 US 220, 227 (1925). As the Second Circuit found, there was no sufficient reason to disturb the jury's verdict. *Cf. Hagelthorn v. Kennecott Corp.,* 710 F2d 76

[3]*See Texas Dept. of Community Affairs v. Burdine,* 450 US 253 (1981); *McDonnell Douglas Corp. v. Green,* 411 US 792 (1973).

(2d Cir 1983). The ultimate burden of persuading the jury by a preponderance of the evidence that he was discharged for age discriminatory reasons rested at all times on the plaintiff. *Stanojev v. Ebasco Services, Inc.*, 643 F2d 914, 919-920 (2d Cir 1981).

Further, the Court found no reason to believe that the jury had been misled by the District Court's charge as to whether age was a determinative factor in petitioner's discharge. *Cf. E.E.O.C. v. Prudential Federal Savings & Loan Assn.*, 741 F2d 1230 (10th Cir 1984); *Hagelthorn v. Kennecott Corp.*, 710 F2d at 82. Petitioner, for his part, essentially argues that the verdict itself was proof that the jury did not apply the Title VII discriminatory test.

In short, petitioner has failed to show this Court anything more substantial than his own belief that he was discriminated against and a general dissatisfaction with the results below. The same arguments were addressed to the Second Circuit without success and do not afford a basis for this Court's review.

CONCLUSION

The petition should be denied.

Dated: Albany, New York
November 6, 1985

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents

ROBERT HERMANN
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PETER H. SCHIFF
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